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Lucy in the Sky with Diamonds: Airline Liability for Checked-in Jewelry

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"LUCY IN THE SKY WITH DIAMONDS"[1]: AIRLINE LIABILITY FOR CHECKED-IN JEWELRY

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I. INTRODUCTION

LUCY, A FREQUENT TRAVELER both within the United States and internationally, arrives at the airport prepared to take her flight from Fort Lauderdale, Florida to Chicago, Illinois. She arrives at the check-in counter of Ace Airlines[3] with two pieces of luggage. Lucy hands her ticket to the ticket agent and checks in her larger piece of luggage. She is given her boarding pass and begins to walk away from the counter toward the boarding gate. Suddenly, after having "eyeballed" Lucy's carry-on bag, the airline ticket agent yells at Lucy, stating that

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[1] The title of this article is taken from the title of a popular Beatles' song. The Beatles, *Lucy in the Sky With Diamonds, on* SGT. PEPPER'S LONELY HEARTS CLUB BAND (Capitol/EMI Records 1967).

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[3] The name of the airline is fictional and any resemblance to an actual business establishment is entirely coincidental.

Lucy must also check that bag, as it is too large to be accepted as carry-on baggage. Lucy has always carried this bag with her on her domestic and international flights and is befuddled by the airline agent's demand. However, as time is running short, Lucy hands the bag over to the agent. The agent takes the bag, and without measuring it or otherwise confirming its capacity as carry-on baggage, checks it in to be placed with other luggage in the cargo hold of the airplane. When Lucy arrives at her destination, she retrieves both pieces of luggage at the baggage claim area. However, upon inspection of the bags' contents, she notices that a gold watch and two gold necklaces that she had placed in the bag she had intended to carry-on are missing. She approaches the airline's customer service counter to file a claim for the missing jewelry. The agent at the customer service counter tells her, "This type of thing happens all the time."[4]

If this type of thing happens all the time, what can a passenger recover for this loss? What is the air carrier's liability to the passenger? Part II of this article will examine the history of airline liability for loss of checked-in jewelry on domestic flights and the current status of the law.[5] Part III will examine this same liability with regard to international flights. Part IV will discuss how these problems have been heightened in the aftermath of the 9/11 terrorist disaster. Lastly, Part V will offer suggestions on possible changes to the airline industry's liability and standards regarding loss of jewelry in checked-in baggage.

II. LIABILITY FOR LOST JEWELRY ON DOMESTIC FLIGHTS

An air carrier's liability for baggage losses on domestic flights is governed by federal law.[6] Currently, a court must refer to federal common law principles to decide an airline's liability for

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[4] Based on a Telephone Interview with Margaret Broenniman, Esq. (April 27, 2004) (concerning the facts of one of her own client's case). The client decided not to pursue the lawsuit for various reasons, including costs involved and the airline's suggestion that they would bring in third party defendants. *Id.*

[5] This article will limit its discussion to commercial passenger air carrier liability and will not address the liability of air carriers that only transport freight. In addition, this article will not address air carrier liability for jewelry lost from carry-on baggage, although these losses and liabilities are referred to in Part IV.

[6] For a comprehensive summary of the federal laws governing an airline's liability for baggage, *see generally* Martin E. Rose & Beth E. McAllister, *The Effect of Post-Deregulation Court Decisions on Air Carriers Liability for Lost, Delayed or Damaged Baggage*, 55 J. AIR L. & COM. 653 (1990).

these losses.[7] However, prior to airline deregulation,[8] an airline's liability for baggage losses was governed by the rules and regulations promulgated by the Civil Aeronautics Board (CAB).[9]

During the time that CAB regulated airlines, air carriers were required to file tariffs with CAB.[10] These tariffs included an air carrier's limits for liability for losses of a passenger's baggage or its contents.[11] When an air carrier filed these tariffs with CAB, a court would deem these tariffs to be valid, and thus binding, unless there was a showing that the CAB rejected the filed tariff.[12] Courts could not question the validity of these tariffs as the agency had primary jurisdiction over the matter.[13] These tariffs incorporated the released valuation doctrine that had de-

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[7] *See, e.g.*, Casas v. Am. Airlines, Inc., 304 F.3d 517, 521 (5th Cir. 2002). For a discussion of the federal common law principles, see *infra* notes 61-98 and accompanying text.

[8] *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.) ("ADA").

[9] Civil Aeronautics Act of 1938, Pub. L. 75-706, 52 Stat. 973 ("CAA"), *superseded by* Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, amended by ADA; *see also Ex parte* Delta Air Lines, Inc., 785 So. 2d 327, 330 (Ala. 2000); Rose & McAllister, *supra* note 6, at 657. Notwithstanding that the CAB rules governed air carrier liability cases, some court decisions were nonetheless based on common law principles of bailment rather than on federal rules. *See, e.g., In re* Nantucket Aircraft Maint. Co., Inc., 54 B.R. 86, 88 (D. Mass. 1985). The general characteristics of a bailment are the transfer of property to another for some purpose with the understanding that the property will be returned when the owner reclaims it. *See, e.g.*, Duxbury v. Spex Feed, Inc., 681 N.W.2d 380, 386 (Minn. Ct. App. 2004) (citing Wallinga v. Johnson, 131 N.W.2d 216, 218 (Minn. Ct. App. 1986)). Those cases concerned alleged loss of jewelry during intrastate rather than interstate flights. *See, e.g., In re Nantucket Aircraft Maint. Co.*, 54 B.R. at 87-88. There were no federal regulations in effect to govern intrastate air carrier liability for these losses. *Id.* at 88 & n.1. For example, in *In re Nantucket Aircraft Maintenance Co.*, a passenger was not permitted to board a small commuter plane with a make-up bag and was required to check it in as baggage; the make-up case contained some jewelry. *Id.* at 87. The airline baggage claim ticket purported to limit liability for losses of baggage and contents to $750. *Id.* The court, however, never reached a decision on whether the airline was liable on the bailment cause of action or whether it could validly limit its liability for the lost jewelry because the passenger waited two days after the flight to check the contents of her make-up case and thus could not prove that the jewelry was lost while in the custody of the air carrier. *Id.* at 88-89.

[10] CAA § 403(a); *see also Ex parte Delta Air Lines*, 785 So. 2d at 330.

[11] *See* Vogelsang v. Delta Air Lines, Inc., 302 F.2d 709, 712 (2d Cir. 1962); Tishman & Lipp, Inc. v. Delta Air Lines, 413 F.2d 1401, 1403-04 (2d Cir. 1969).

[12] *Tishman & Lipp*, 413 F.2d at 1403 ("Tariffs filed with the Civil Aeronautics Board if valid, are conclusive and exclusive, and the rights and liabilities between airlines and their passengers are governed thereby."); Lichten v. E. Airlines, Inc., 189 F.2d 939, 941 (2d Cir. 1951).

[13] *Lichten*, 189 F.2d at 941.

veloped under federal common law prior to enactment of the Civil Aeronautics Act.[14] The released valuation doctrine permits an airline to limit its liability for lost baggage, including jewelry, when a passenger is given notice and an opportunity to purchase coverage for an increased value.[15] Thus, if a passenger did not declare the value of her jewelry and did not pay for the additional coverage, then the airline's liability would be limited according to the limits in its tariff. Passengers were deemed to have notice of the liability limitations specified in the tariffs as they had been filed with CAB; the tariffs did not have to be printed on the airline ticket itself.[16]

Because the tariffs followed the released valuation doctrine, most airlines' tariffs were similarly worded. For instance, a Trans World Airlines tariff limited liability to the value of the property, not to exceed $750, unless the passenger paid for greater liability.[17] Because these tariffs were deemed to be a binding term of the contract between the airline and the passenger,[18] the air carriers generally won any case regarding claims for lost jewelry because of the limits in the filed tariffs.[19] For example, in *Vogelsang v. Delta Air Lines*, a passenger checked in as baggage a case allegedly containing jewelry worth $69,275.87.[20] At the time, Delta's tariff stated that liability was limited to the value of the property, not to exceed $100 per ticket, unless the passenger had declared a higher value for baggage being checked in and paid a price for that value.[21] The passenger neglected to declare the value of the jewelry and pay a price for increased coverage; the cost for increased coverage would have exceeded the cost of his one-way fare.[22] Upon arrival at his destination, the passenger discovered that the bag containing the jewelry apparently had been given to another man who had approached the baggage handlers unloading the plane

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[14] Rose & McAllister, *supra* note 6, 657-58.

[15] Feature Enters v. Cont'l Airlines, 745 F. Supp. 198, 200 (S.D.N.Y. 1990); *see also Vogelsang*, 302 F.2d at 712 ("a provision limiting liability for baggage unless a higher valuation is declared and higher charges are paid" was required by CAB).

[16] *Tishman & Lipp*, 413 F.2d at 1403-04.

[17] Chambers & Assocs. v. Trans World Airlines, 533 F. Supp. 426, 428 (S.D.N.Y. 1982).

[18] *See Tishman & Lipp*, 413 F.2d at 1403; *see also Lichten*, 189 F.2d at 941.

[19] Rose & McAllister, *supra* note 6, at 659; *see, e.g., Vogelsang*, 302 F.2d at 713.

[20] *Vogelsang*, 302 F.2d at 710.

[21] *Id.* at 710-11.

[22] *Id.* at 711.

and produced a claim ticket.[23] Although the airline's baggage handlers breached Delta's own internal rules by not confirming and retaining the claim tag and by delivering a bag at the ramp rather than at the baggage claim area,[24] the court limited the airline's liability to $100, the maximum exposure pursuant to Delta's tariff filed with CAB.[25]

Some airline tariffs that were filed with CAB went beyond limiting liability for the loss of jewelry. These air carriers' tariffs included exculpatory clauses wherein the air carrier provided that it would not be liable for any loss of jewelry whatsoever.[26] In *Lichten v. Eastern Airlines*, a passenger checked in a piece of luggage that contained some jewelry.[27] This baggage ended up at a destination other than the passenger's place of arrival[28] and, as in *Vogelsang*,[29] was wrongly delivered to another individual.[30] The bag was eventually returned to the airline, but $3,187.95 worth of jewelry was allegedly missing from it.[31] The passenger sued Eastern Airlines to recover the value of the lost jewelry.[32] The passenger based her claim on two theories. Her first argument was that, although Eastern's tariff had been duly filed with CAB without rejection, CAB could not abrogate the common law rule that an air carrier could not relieve itself of total liability for its negligent acts.[33] The court, however, rejected the passenger's argument stating that CAB had the sole authority to supervise tariffs.[34] The court reasoned that since the Civil Aeronautics Act did not expressly prohibit a total exemption from liability, then CAB had the authority to accept the tariff that Eastern had filed.[35] The passenger also argued that even if the tariff was valid, Eastern violated it by negligently diverting the baggage to another destination; thus, she argued that the air

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[23] *Id.*

[24] *Id.*

[25] *Id.* at 710-11.

[26] *Lichten*, 189 F.2d at 940; *Tishman & Lipp*, 413 F.2d at 1403 (stating that Delta was not liable for loss of jewelry in checked baggage).

[27] *Lichten*, 189 F.2d at 940.

[28] *Id.*

[29] *See Vogelsang*, 302 F.2d at 710.

[30] *Lichten*, 189 F.2d at 940.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 941.

[34] *Id.*

[35] *Id.* The court compared the provisions of the CAA to that of the Interstate Commerce Act which did contain a provision expressly prohibiting such exculpatory clauses. *Id.*

carrier's breach of the contract "deprived the carrier of the benefit of the exculpatory provisions of the tariff."[36] The court likewise rejected this argument, stating that a conversion had not occurred and, therefore, Eastern could assert the defense of its exculpatory provision.[37] The trial court judgment was affirmed and the passenger recovered nothing for her lost jewelry.[38] However, courts and commentators have criticized the *Lichten* court's statutory construction and thus, the decision has been rarely followed.[39]

With the advent of airline deregulation, commentators speculated that state law rather than federal law would govern claims against airlines for lost baggage.[40] However, that has not been the case. It is well settled that federal law preempts state law concerning claims for lost baggage.[41] In *Ex parte Delta Air Lines*, a passenger approached a special ticket counter set up by Delta to provide service at a cruise port.[42] The ticket agent, however, advised the passenger that she would have to obtain a security sticker from another location before checking in her bags.[43] The Delta agent advised the passenger that she could leave the bags at the counter until the passenger returned with the sticker. The passenger left all her baggage, including one that she was planning to carry on the plane with her.[44] When the passenger returned, all her bags, including the carry-on, had already been transferred to Delta's truck for transport to the airport; the Delta agent refused to retrieve the carry-on bag, even after the passenger advised the agent that it contained jewelry.[45]

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[36] *Id.* at 942.

[37] *Id.*

[38] *Id.*

[39] Rose & McAllister, *supra* note 6, at 677 (citing several cases and law review articles); *see also Lichten*, 189 F.2d at 942-45 (Frank, J., dissenting); *but see, e.g., Vogelsang*, 302 F.2d at 713 ("[T]he Lichten decision is a fortiori authority.").

[40] Rose & McAllister, *supra* note 6, at 666.

[41] Casas v. Am. Airlines, Inc., 304 F.3d 517, 525 (5th Cir. 2002) (citing Hodges v. Delta Airlines, 44 F.3d 334 (5th Cir. 1995)); *Ex parte* Delta Air Lines, Inc., 785 So. 2d 227, 334 (Ala. 2000); Feature Enters. v. Cont'l Airlines, 745 F. Supp. 198, 199 (S.D.N.Y. 1990).

[42] *Ex parte Delta Air Lines*, 785 So. 2d at 328.

[43] *Id.*

[44] *Id.* at 328-29.

[45] *Id.* at 329. Rapper Lil' Kim was involved in a similar incident when her carry-on bag, which allegedly contained $250,000 worth of jewelry, was checked in with other luggage for a flight from New York to Los Angeles. Although the air carrier did retrieve the carry-on bag from the baggage hold before the flight departed, the jewelry was reportedly missing from the bag when it was returned to Lil' Kim. *Pop Notes*, WASH. POST, June 25, 2003, *available at* 2003 WL 56501262.

Upon reaching her destination, the passenger discovered that the bag was missing. It was found a few days later but the jewelry was missing from it.[46] The passenger sued the air carrier claiming negligence and breach of contract.[47] The lower courts ruled in favor of the passenger, awarding her more than Delta's $1,250 liability limit that formed part of its contract of carriage; the intermediate appellate court affirmed.[48] On appeal, the Supreme Court of Alabama ruled that federal law applied and that the passenger's state law claims were preempted.[49] In reaching its decision, the state supreme court cited two United States Supreme Court decisions which discussed preemption[50] and referred to the Airline Deregulation Act's preemption provision which states that "[a] state . . . may not enact or enforce a law, regulation, or other provision having the force or effect of law related to a price, route, or service of any air carrier."[51] The Alabama Supreme Court rejected the passenger's argument that the air carrier exceeded its tariff boundaries when the agent offered to take care of the bags until the passenger returned with the security ticket.[52] It stated that Delta's tariff, which limited liability for lost baggage to $1,250, was part of the contract of carriage; in addition, it stated that a claim for loss of jewelry from luggage transported by Delta is a claim "related to" the air carrier's service as the term is used in the ADA's preemption provision.[53] Thus, a domestic baggage loss claim is a federal cause of action.

Deregulation did not mean that no federal regulations would be in effect to govern commercial passenger airlines. As such, federal regulations and common law principles both affect passengers' lost baggage claims.[54] Part 254 of Title 14 of the Code of Federal Regulations sets rules for domestic baggage liability.[55] This part "establish[es] rules for the carriage of baggage in in-

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46 *Ex parte Delta Air Lines*, 785 So. 2d at 329.

47 *Id.*

48 *Id.* at 328-29.

49 *Id.* at 329, 334.

50 *Id.* at 330-32, 334 (citing Am. Airlines, Inc. v. Wolens, 513 U.S. 219 (1995); Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992)).

51 *Id.* at 330 (quoting 49 U.S.C. § 41713(b)(1) (1997)).

52 *Id.* at 334.

53 *Id.*

54 *See infra* notes 55-98 and accompanying text.

55 14 C.F.R. § 254.1-.6 (2004).

terstate and intrastate [passenger] air transportation."[56] The rules provide that an air carrier may not limit its liability for lost personal property, including baggage, to less than $2,500.[57] Air carriers covered by this part must also provide a notice to passengers advising them of the limitations on liability for baggage loss.[58]

This notice, and other terms, may be incorporated by reference into the contract of carriage.[59] However, the air carrier must make these incorporated terms available for public inspection.[60] The notice concerning information regarding limitations on liability for loss of jewelry, among other items, and baggage must be "conspicuous."[61] The federal courts generally employ a two-step "reasonable communicativeness" test to determine whether an air carrier's notice meets this requirement.[62] The first prong of the test examines the adequacy of the notice with regard to such things as its clarity, type, size, and conspicuousness.[63] For instance, in *Casas v. American Airlines*, the airline ticket included an attached notice, all in capital letters, regarding American Airlines' limitations of liability for certain items; the court found that this met the first prong of the test.[64] The second prong of the test examines the circumstances surrounding the purchase and retention of the ticket to determine whether the passenger had an opportunity to study and understand the limitations imposed by the air carrier.[65] Courts will look at such facts as whether the passenger had sufficient time to read the notice and whether the passenger is a novice or an

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[56] *Id.* § 254.1-.2. Previously, rules were not in effect for intrastate transport. *See supra* note 9. However, these rules for smaller commuter air carriers apply only when ticketed as part of another flight segment on an aircraft of more than 60 seats. *Id.* § 254.3-.4.

[57] *Id.* § 254.4. The U.S. Department of Transportation will review the minimum liability amount every two years, using the Consumer Price Index, and will adjust it accordingly. *Id.* § 254.6.

[58] *Id.* § 254.4.

[59] *Id.* § 253.5.

[60] *Id.* § 253.4(b).

[61] *Id.* §§ 253.5, 254.5.

[62] Harger v. Spirit Airlines, Inc., No. 01 C 8606, 2003 WL 21218968, at *5 (N.D. Ill. May 22, 2003) (citing Deiro v. Am. Airlines, Inc., 816 F.2d 1360, 1364 (9th Cir. 1987); Casas v. Am. Airlines, Inc., 304 F.3d 517, 524 (5th Cir. 2002); Huang v. Int'l Total Servs., No. 94-75368, 1997 WL 33377508, at *3 (E.D. Mich. Apr. 17, 1998)). *But see* Rose & McAllister, *supra* note 6, at nn.101-04 and accompanying text (citing cruise line cases which focus only on first prong of *Deiro* decision).

[63] *See, e.g., Deiro*, 816 F.2d at 1364.

[64] *Casas*, 304 F.2d at 524.

[65] *See, e.g., Deiro*, 816 F.2d at 1364.

experienced air traveler.[66] Thus, if the airline meets this test, a passenger who loses jewelry from checked-in baggage may only recover the limits set out in the air carrier's contract of carriage.[67]

Notwithstanding the foregoing, an air carrier may still be bound to follow the dictates of the released valuation doctrine.[68] Deregulation did not affect the applicability of this doctrine,[69] although a few courts have stated that the reasonable valuation doctrine is inapplicable to passenger airlines.[70] At least one post-deregulation case states that a passenger must be given alternative means of protecting luggage by allowing the passenger to purchase excess insurance or carry the bag on the plane.[71] Therefore, in order to ensure that it may limit its liability for loss of baggage or its contents, an air carrier should give notice to passengers regarding the opportunity to purchase excess valuation insurance.[72] Generally, courts have held that if a notice is found to be reasonable under the reasonable communicativeness test, then it also is reasonable notice for purposes of the released valuation doctrine.[73]

Most major airlines have similar tariff provisions regarding liability limitations for lost baggage.[74] Commonly, the tariffs state

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[66] *Id.* at 1365 (passenger was "experienced commercial air traveler" who purchased his ticket nine days in advance); *Casas*, 304 F.3d at 525 (passenger, an attorney, was not novice air traveler who seemingly had time to review his travel documents); *Harger*, 2003 WL 21218968, at *6 (passenger who had two hours before departure to review her ticket was "experienced commercial air traveler" familiar with airline tickets and international baggage liability limitations).

[67] *See Harger*, 2003 WL 21218968, at *7; *see also Casas*, 304 F.3d at 525 (airline's fulfillment of two-step reasonable communicative analysis bound passenger to air carrier's limits for losses of valuable items).

[68] *See supra* notes 14-15 and accompanying text.

[69] *Deiro*, 816 F.2d at 1365 (citing First Pa. Bank v. E. Airlines, 731 F.2d 1113, 1122 (3d Cir. 1984)).

[70] *See* Gluckman v. Am. Airlines, Inc., 844 F. Supp. 151, 161 n.5 (S.D.N.Y. 1994); Wells v. Am. Airlines, Inc., No. 88 Civ. 5729, 1991 WL 79396, at *4 (S.D.N.Y. May 9, 1991) (doctrine is applicable to shippers where fares are dependent on the value of the goods, but passenger baggage is merely incidental to passenger travel).

[71] Coughlin v. Trans World Airlines, Inc., 847 F.2d 1432, 1433 (9th Cir. 1988).

[72] *Id.*; Feature Enters v. Cont'l Airlines, Inc. 745 F. Supp. 198, 200 (S.D.N.Y. 1990).

[73] Harger v. Spirit Airlines, Inc. No. 01 C 8606, 2003 WL 21218968, at *9 (N.D. Ill. May 22, 2003) (quoting *Deiro*, 816 F.2d at 1365 n.4).

[74] *See* Lippert v. Delta Air Lines, Inc., 509 U.S. 905 (1993); *see* Petition for a Writ of Certiorari to the Supreme Court of Florida, 1993 WL 13076764, at *17 (No.92-1643).

that the air carrier's liability will be limited to a maximum of $2,500 unless the passenger pays for higher liability.[75] More importantly, given the focus of this article, air carriers continue to include an exclusion of liability provision for loss of a passenger's jewelry.[76] Some airlines include an additional notice that jewelry is not acceptable in checked-in baggage.[77] Additionally, airlines have excluded checked jewelry from excess insurance coverage.[78]

However, because federal common law prevented an airline from completely relieving itself of liability prior to regulation under the Civil Aeronautics Act,[79] one commentator stated that "with a return to federal common-law principles [given deregulation], exculpatory provisions are, once again, unenforceable."[80] One court noted that "federal courts have . . . [stated] that there is a 'black letter rule' that a common carrier cannot completely exculpate itself from liability."[81]

In *Feature Enterprises*, the most recent case cited by that court, the passenger, a salesman for a wholesale jewelry manufacturer, checked in as baggage a case allegedly containing $175,000 worth of jewelry; it was the company's policy to check in jewelry cases as baggage without notifying the air carrier of their con-

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[75] *See, e.g.*, Delta Domestic General Rules, Tariff Rule 190(J), *available at* http://www.delta.com/pdfs/contract_of_carriage_dom.pdf; Continental Airlines, Inc. Contract of Carriage Rule 28, *available at* http://www.continental.com/travel/policies/contract/co_contract_of_carriage.2004080101.pdf; American Airlines Condition of Carriage sec. 6, *available at* http://www.aa.com/content/customerService/customerCommitment/conditionsOfCarriage.jhtml#American%20Airlines%20Conditions%20of%20Carriage. Contrary to federal common law requirements, the contract of carriage that appears on Spirit Airlines' website does not advise passengers that they may purchase any such insurance, *see* Spirit Airlines Contract of Carriage sec. VI, *at* http://www.spiritairlines.com/welcome.aspx?pg=contractcarriage#BAGGAGE.

[76] *See supra* note 75; *see also supra* note 26 and accompanying text.

[77] *See, e.g.*, Delta Domestic General Rules, *supra* note 75; American Airlines Condition of Carriage, *supra* note 75.

[78] *See, e.g.*, American Airlines Condition of Carriage, *supra* note 75; Continental Airlines, Inc. Contract of Carriage, *supra* note 75. There are no reported cases as to whether this exclusion would be upheld by the courts.

[79] Klicker v. N.W. Airlines, Inc., 563 F.2d 1310, 1314 (9th Cir. 1977).

[80] Rose & McAllister, *supra* note 6, at 678. The commentator somewhat qualified the statement further in the article by stating that "*At this time*, . . . there should be no misunderstanding that exculpatory provisions are invalid." *Id.* at 681 (emphasis added).

[81] Freedman v. N.W. Airlines, Inc., 638 N.Y.S.2d 906, 907 (Albany City Ct. 1996) (citing Feature Enters v. Cont'l Airlines, Inc., 745 F. Supp. 198 (S.D.N.Y. 1990)); *see also* First Pa. Bank v. E. Airlines, 731 F.2d 1113, 1116 (3d Cir. 1984); *Klicker*, 563 F.2d at 1312.

tents nor paying for excess valuation insurance.[82] The passenger checked in his bags at curbside.[83] The case was never found afterward.[84] Continental Airlines' tariff, which properly provided notice to the passenger,[85] limited its liability for lost baggage to $1,250, but also excluded any liability for loss of jewelry.[86] When Continental moved for summary judgment based on its exculpatory clause, the court ruled in favor of the jewelry manufacturer;[87] however, the court limited Continental's liability to the $1,250 maximum stated in its tariff.[88] The court held that the exculpatory clause was illegal because federal regulations required an air carrier to limit its liability to no less than $1,250.[89] The court stated that "it would be illogical for the regulations to outlaw a limitation of less than $1,250, but to permit an exclusion of liability, i.e., zero liability."[90]

However, a recent Fifth Circuit case ruled that exculpatory clauses may be valid and binding.[91] *Casas* explicitly rejected the holding in *Feature Enterprises* that an airline could not contract to exculpate itself from liability.[92] The court noted that there has been a "longstanding disagreement among the courts [on] whether an air carrier may 'exculpat[e] itself entirely from liability from loss of particular classes of articles, including jewelry.'"[93] In *Casas,* American Airlines attached to its airline ticket a notice, written in capital letters, stating that the airline was not responsible for "jewelry, . . . camera equipment, or other similar valuable items contained in checked . . . baggage."[94] Notwithstanding the notice, the passenger checked in his video camera

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[82] *Feature Enters.*, 745 F. Supp. at 199 (cited in *Freedman,* 638 N.Y.S.2d at 907).

[83] *Id.* The court noted that "all evidence indicates that the . . . case was stolen by a third party in the short period while it was 'at curbside' and that it was never loaded by the airline or its agents." *Id.* at 200. However, check-in of the bag had been completed and, consequently, Continental Airlines was sued as a defendant together with ITS, Inc., the skycap company that handled curbside check-in for the air carrier. *Id.* at 199.

[84] *Id.* at 199, 200.

[85] *Id.* at 200.

[86] *Id.* at 199.

[87] *Id.*

[88] *Id.* at 201.

[89] *Id.* at 199 (citing an earlier version of 14 C.F.R. § 254).

[90] *Id.* at 199.

[91] Casas v. Am. Airlines, Inc., 304 F.3d 517, 525 (5th Cir. 2002).

[92] *Id.*

[93] *Id.* at 524 n.1 (quoting First Pa. Bank v. E. Airlines, 731 F.2d 1113, 1117 n.5 (3d Cir. 1984)).

[94] *Id.* at 524 (quoting American Airlines Condition of Carriage, *supra* note 75). The court noted that the airline's notice satisfied the reasonable communicative-

as baggage, which was then lost; thereafter the passenger sued the airline.[95] The court first held that the passenger did not have a private cause of action to sue under Part 254 of the Code of Federal Regulations, which limits an airline's liability to no less than a certain sum.[96] The court further held that the passenger was contractually bound by the exculpatory provision and that he could not recover anything for loss of his video camera.[97] In reaching this decision, the court relied on case decisions, which viewed federal common law as enforcing "contract provisions that . . . hold [an air carrier] harmless for lost . . . valuable goods."[98]

Yet other courts have held that an air carrier may be liable for valuable items even when the passenger has been given reasonable notice of the air carrier's liability and opportunity to purchase excess insurance.[99] In *Coughlin*, a passenger wished to carry her deceased husband's ashes onto the plane; the package containing the cremated remains fell within the airline's size restrictions for carry-on baggage.[100] Although the airline's tariff stated that passengers should carry valuable, thus irreplaceable, items with them, the ticket agent refused to permit the passenger to carry the package on board the plane.[101] The package was ultimately lost, and the passenger subsequently sued the airline.[102] The Ninth Circuit held that the carrier breached its contract of carriage by denying the passenger the right to carry the package aboard the plane pursuant to its own policy of having passengers protect valuables by carrying them onto the plane.[103] As such, since the airline's breach of the express terms of its contract caused the loss of the baggage, the airline could not now invoke the terms of its contract, i.e., the limitations of liability provision, to avoid liability.[104]

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ness test. *Id.* For a discussion of the reasonable communicative test, see *supra* notes 62-67 and accompanying text.

95 *Casas*, 304 F.3d at 519.

96 *Id.* at 522-23.

97 *Id.* at 525.

98 *Id.* at 524 (citing Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922, 929-30 (5th Cir. 1997)); Deiro v. Am. Airlines, Inc., 816 F.2d 1360, 1365 (9th Cir. 1987).

99 Coughlin v. Trans World Airlines, Inc., 847 F.2d 1432, 1433-34 (9th Cir. 1988)(en banc); Harger v. Spirit Airlines, Inc., No. 92-1643, 2003 WL 21218968, at *5-9 (N.D. Ill. May 22, 2003).

100 *Coughlin*, 847 F.2d at 1433.

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.* at 1434.

A recent case involving lost jewelry followed *Coughlin*'s lead in deciding that an airline's breach of its own contract may not release it from liability for lost baggage notwithstanding any limitations or exculpatory provisions.[105] In *Harger*, a passenger involved in the jewelry business wanted to take a bag allegedly containing $250,000 worth of jewelry on board the plane with her.[106] The airline's tariff permitted one carry-on bag as long as it met certain size restrictions.[107] The air carrier's agent told the passenger that the bag would have to be checked in due to its excessive size.[108] The passenger advised the agent that it contained jewelry and that she had carried the bag with her on other flights.[109] Nevertheless, the agent took the jewelry bag from the passenger and checked it in as baggage.[110] Soon after reaching her destination, the passenger discovered that some jewelry, worth more than $140,000, was missing from her bag.[111] The passenger sued Spirit Airlines, asserting breach of contract.[112] The airline moved for summary judgment, asserting that it either had no liability or limited liability pursuant to the limitations notice in its contract of carriage.[113] Those limitations, also printed on the ticket jacket, stated that liability for lost baggage was limited to $2,500, but that jewelry was not acceptable for transportation and the airline was not responsible for lost jewelry.[114] The court stated that the airline had met the reasonable communicativeness test in notifying the passenger about its liability limitations;[115] the airline also had satisfied the released valuation doctrine.[116] However, the court denied summary judgment in favor of the airline.[117] The court noted that Spirit Airlines had not produced evidence that the jewelry bag exceeded the carry-on size restrictions.[118] Therefore, if the jew-

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105 *Harger*, 2003 WL 21218968, at *8.
106 *Id.* at *1-2.
107 *Id.* at *2.
108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.* at *4.
112 *Id.* at *1. The passenger also sued for negligent misrepresentation; however, the court ruled in favor of the airline based on the economic loss doctrine. *Id.* at *9-10.
113 *Id.* at *4.
114 *Id.* at *3, 4.
115 *Id.* at *5-7.
116 *Id.* at *8-9.
117 *Id.* at *8, 11.
118 *Id.* at *8.

elry bag did, in fact, meet the size restrictions, then the airline breached the carry-on baggage provisions of its contract of carriage and, thus, its liability limitations provisions would be unenforceable.[119]

Given the foregoing discussion, it seems that, after deregulation of the airline industry, the question of air carrier liability for lost checked-in jewelry on domestic flights no longer hinges only on reasonable notice of liability limits and the released valuation doctrine. Passengers may be able to successfully sue if the air carrier is found to have breached its own contract of carriage.

III. LIABILITY FOR LOST JEWELRY ON INTERNATIONAL FLIGHTS

For over seventy years, the Warsaw Convention[120] governed passenger claims for lost baggage on international flights.[121] Then, in 2003, the United States ratified another treaty known as the Montreal Convention.[122] This treaty, which came into effect on November 4, 2003, replaces the Warsaw Convention system concerning liability to passengers.[123] Under the Supremacy

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[119] *Id.* at *8.

[120] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* note following 49 U.S.C. § 40105 (West 2001) [hereinafter Warsaw Convention], *amended by* Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 Oct. 1929, as amended by Protocol Done at the Hague on 28 September 1955, Sept. 25, 1975, opened for signature Sept. 25, 1975, *reprinted in* S. Exec. Rep. No. 105-20, at 21-32 (1998) [hereinafter Montreal Protocol No. 4], *available at* http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.88&filename=er020.105&directory=/diskc/wais/data/105_cong_reports [together with Warsaw Convention hereinafter Amended Warsaw Convention], *available at* http://www.iata.org/NR/ContentConnector/CS2000/Siteinterface/sites/legal/file/warsaw.pdf. For a general discussion of the Warsaw Convention, *see* Paul Stephen Dempsey, *International Air Cargo & Baggage Liability and the Tower of Babel*, 36 GEO. WASH. J. INTL L. & ECON. 239, 242-49 (2004).

[121] Warsaw Convention, *supra* note 120, art. 1.

[122] Convention for the Unification of Certain Rules for International Carriage by Air, *opened for signature* May 28, 1999, ICAO Doc. 9740 [hereinafter Montreal Convention]. For a general discussion of the Montreal Convention, *see* Blanca I. Rodriguez, *Recent Developments in Aviation Liability Law*, 66 J. AIR L. & COM. 21, 25-35 (2000); *see also* Ehrlich v. Am. Airlines, 360 F.3d 366, 371 n.4 (2d Cir. 2004).

[123] *See Ehrlich*, 360 F.3d at 371 n.4. The treaty will apply to travel between member countries. U.S. Dep't of Transp., *United States Ratifies 1999 Montreal Convention* (Sep. 5, 2003), *available at* http://www.dot.gov/affairs/dot10303.htm; *see also* Dempsey, *supra* note 120, at 269-72 (discussing generally the applicability of air-

Clause of the United States Constitution, a treaty is the law of the land[124] and thus preempts state law causes of action.[125] As the Montreal Convention is relatively new, there are currently no reported decisions in which it has been applied. Therefore, this part will discuss liability under the Warsaw Convention and the changes pursuant to the Montreal Convention.

Under the Warsaw Convention, an airline is presumptively liable for lost baggage under its care.[126] However, the treaty limits liability based on the weight of the baggage.[127] A passenger may obtain additional coverage by declaring a higher value and paying a supplementary charge,[128] similar to the release valuation doctrine which applies to domestic flights under federal common law.[129] An airline cannot limit its liability further than the amount established under Article 22 of the Warsaw Convention, nor can it exculpate itself completely from liability for lost baggage or its contents.[130] In *Cohen v. Varig Airlines*, the air carrier claimed that it was not liable for the loss of a passenger's jewelry contained in a missing suitcase because Varig's tariff excluded liability for such losses.[131] The court stated that any airline's attempt to fix a liability limit lower than provided by the Warsaw Convention was invalid.[132]

Most lawsuits related to liability for lost baggage under the Warsaw Convention have involved Articles 4 and 25 of that treaty. Article 25 provides that an air carrier may not limit its liability pursuant to article 22 if the baggage loss is due to the air

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line liability treaty). As of August 14, 2004, there were fifty-six parties to the Montreal Convention. International Civil Aviation Organization, *List of Parties to the Montreal Convention of 1999* (2004), *at* http://www.icao.int/icao/en/leb/mtl99.htm.

[124] Ijedinma v. N.W. Airlines, No. 00-1492, 2001 WL 803745, at *2 (E.D. La. July 12, 2001); *see also* Lourenco v. Trans World Airlines, Inc., 581 A.2d 532, 537 (N.J. Super. Ct. 1990) (citing Reed v. Wiser, 555 F.2d 1079, 1093 (2d Cir. 1977)).

[125] Iyegha v. United Airlines, Inc., 659 So. 2d 45, 47, 48 (Ala. 1995); *Ijedinma*, 2001 WL 803745, at *2.

[126] Perri v. Delta Air Lines, Inc., 104 F. Supp. 164, 167 (E.D.N.Y. 2000) (citing Warsaw Convention, *supra* note 120, art. 18(1)).

[127] Warsaw Convention, *supra* note 120, art. 22(2). The treaty's limit was "250 [French] francs per kilogram." *Id.* The conversion amounts to USD $20.00 per kilogram. *See Lourenco*, 581 A.2d at 534 n.2 (citing CAB Order 74-1-6, 39 Fed. Reg. 1526 (1974) and CAB Order 78-8-10, 43 Fed. Reg. 35971 (1978)).

[128] Warsaw Convention, *supra* note 120, art. 22(2).

[129] For a discussion of released valuation doctrine, see *supra* notes 14-15 and accompanying text.

[130] Warsaw Convention, *supra* note 120, art. 23.

[131] Cohen v. Varig Airlines, 405 N.Y.S.2d 44, 48 (App. Div. 1978).

[132] *Id.*

carrier's "willful misconduct" or equivalent conduct.[133] Courts have interpreted that term to mean an intentional act or omission with knowledge that it will result in damage or knowing and reckless disregard for the probable damage that the act or omission will cause.[134] Willful misconduct is subjective and thus is determined based on the facts of each individual case.[135]

One court found that an airline was guilty of willful misconduct when its employees told the passengers that their baggage was on the plane, even though it had actually been removed.[136] In another case, a bag containing jewelry did not arrive with the passengers' other luggage at their destination.[137] The airline located the baggage at another airport's curbside.[138] When the baggage was returned to the passengers, they discovered that the lock had been cut off and all the jewelry was missing.[139] The court stated that since the bag was found at curbside at another airport and the airline's employees may have lost or stolen the jewelry the airline may have committed willful misconduct.[140] In yet another case, the passengers had been assured by the air carrier's agent that he had personally seen their baggage placed on the plane.[141] Although the passengers were to remain at the plane's first destination, the baggage was then apparently transferred to another plane that was continuing elsewhere.[142] The airline's representatives refused to locate the baggage and told the passengers they would have to wait two days for that other plane's return flight.[143] The luggage, which contained some jewelry, was ultimately lost.[144] Given these facts, the court held that the air carrier committed willful misconduct because the

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[133] Warsaw Convention, *supra* note 120, art. 25.

[134] *Cohen*, 405 N.Y.S.2d at 47 (quoting three cases as to the definition of willful misconduct); Psarras v. Am. Airlines, No. 84-2-0530, 1986 WL 6350, at *3 (Ohio Ct. App. 1986) (quoting Maschinenfabrik Kern, A.G. v. N.W. Airlines, 562 F. Supp. 232, 240 (N.D. Ill. 1983)).

[135] *See Psarras*, 1986 WL 6350, at *3 (quoting *Maschinenfabrik Kern, A.G.*, 562 F. Supp. at 240).

[136] Compañia de Aviación Faucett S.A. v. Mulford, 386 So. 2d 300, 301 (Fla. Dist. Ct. App. 1980).

[137] *Psarras*, 1986 WL 6350, at *1.

[138] *Id.*

[139] *Id.*

[140] *Id.* at *3.

[141] *Cohen*, 405 N.Y.S.2d at 45.

[142] *Id.* at 45-46.

[143] *Id.* at 46.

[144] *See id.* at 46, 48.

airline's agent knew or should have known that the baggage was loaded on another plane.[145]

Cases brought under Article 4 of the Warsaw Convention concern the manner in which the baggage was checked in by the air carrier. Article 4 requires the air carrier to deliver a baggage check document that includes, among other things, the number and weight of the bags being checked in.[146] A split in authority existed as to whether an air carrier was liable beyond the set limits if it did not strictly comply with this requirement.[147] Some courts held that an air carrier's failure to record the number and weight of the bags was a "technical and insubstantial omission";[148] thus, the passenger could only recover damages pursuant to Article 22. For example, in *Lourenco v. Trans World Airlines*, a passenger alleged that over $9,000 worth of jewelry was missing from checked baggage that had been lost for three days.[149] Although the ticket agent had neglected to note on the baggage check the number and weight of the luggage,[150] the air carrier claimed that its liability was limited pursuant to the Warsaw Convention.[151] The court agreed, adopting the line of cases that liberally construed the Warsaw Convention.[152]

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145 *Id.* at 47-48.

146 Warsaw Convention, *supra* note 120, art. 4. The baggage check also would include

> (a) [t]he place and date of issue; (b) [t]he place of departure and of destination; (c) [t]he name and address of the carrier or carriers; (d) [t]he number of the passenger ticket; (e) [a] statement that delivery of the baggage will be made to the bearer of the baggage check; . . . (g) [t]he amount of the value declared in accordance with Article 22(2); [and] (h) [a] statement that the transportation is subject to the rules relating to liability established by [the Warsaw] convention.

Id.

147 *See* Lourenco v. Trans World Airlines, Inc., 581 A.2d 532, 534 (N.J. Super. Ct. 1990).

148 *Id.* at 535 (citing several cases holding that failure to include baggage number and weight information is technical and insubstantial).

149 *Id.*

150 *Id.* at 533.

151 *Id.*

152 *Id.* at 537 (citing Exim Indus., Inc. v. Pan Am. World Airways, 754 F.2d 106 (2d Cir. 1985); Abbaa v. Pan Am. World Airways, Inc., 673 F. Supp. 991 (D. Minn. 1987); Republic Nat'l Bank of N.Y. v. E. Airlines, 639 F. Supp. 1410 (S.D.N.Y. 1986); The Hartford Ins. Co., v. Trans World Airlines, Inc., 671 F. Supp. 693 (C.D. Cal. 1987); Martin v. Pan Am. World Airways, Inc., 563 F. Supp. 135 (D.D.C. 1983)).

However, another line of cases strictly construed Article 4, holding that recording the number and weight of luggage was a requirement for limiting an air carrier's liability.[153] In *Perri v. Delta Air Lines*, a passenger's two bags, which allegedly included jewelry and clothing worth more than $16,000, were lost by the airline.[154] As was routine practice for the airline, the agent had noted the weight of the baggage on the flight's manifest but had not recorded that information, nor the number of bags, on the passenger's baggage claim stub or ticket.[155] The court noted that subsection 4 of Article 22 provided that "'if the baggage check does not contain' these particulars, 'the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.'"[156] As the United States Supreme Court had stated that "unambiguous provisions of the Warsaw Convention must be literally construed,"[157] the *Perri* court held that the provision in Article 4 was not ambiguous and thus, the airline could not avail itself of liability limits when it failed to record the baggage information for the passenger.[158]

This issue was rendered moot when the United States ratified Montreal Protocol No. 4,[159] which took effect in March 1999.[160] This ratification amended the Warsaw Convention and eliminated the requirement that an air carrier record the number and weight of baggage on a claim check.[161] The amended Warsaw Convention merely required the air carrier to provide the passenger with a claim check indicating the passenger's places of departure and destination and notice of the liability limitations; failure to do so would exclude the airline from asserting the liability limits.[162]

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[153] *Id.* at 534-35 (citing several cases holding that air carriers are required to record baggage number and weight information in order to limit liability).

[154] Perri v. Delta Air Lines, Inc., 104 F. Supp. 2d 164, 165 (E.D.N.Y. 2000).

[155] *Id.* at 166.

[156] *Id.* at 167 (quoting Warsaw Convention, *supra* note 120, art. 4(4)).

[157] *Id.* (citing Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134-35 (1989)).

[158] *Id.* at 167-68.

[159] *See* Montreal Protocol No. 4, *supra* note 120.

[160] S. Rep. No. 106-35, at 3 (1999).

[161] *See* Amended Warsaw Convention, *supra* note 120, art. 4; *see also Perri*, 104 F. Supp. 2d at 168; Ijedinma v. N.W. Airlines, No. 00-1492, 2001 WL 803745, at *2 n.1 (E.D. La. July 12, 2001).

[162] Amended Warsaw Convention, *supra* note 120, art. 4. The Amended Warsaw Convention also affected, among others, the following changes to the articles discussed herein: 1) Article 22 referred to monetary compensation in terms of "special drawing rights" as defined by the International Monetary Fund; 2) the term "willful misconduct" in Article 22 was substituted as "an act or omission of

There are very few reported cases after the ratification of Montreal Protocol No. 4 that deal with the baggage liability limitation issue.[163] One case, in which a passenger's lost baggage allegedly contained a substantial amount of cash and jewelry,[164] mistakenly applied the original version of Article 4 of the Warsaw Convention although the incident occurred almost one month after ratification of Montreal Protocol No. 4.[165] This error, however, would not have affected the outcome of the case as the court held that the air carrier had met the Warsaw Convention's stricter provisions, which included notice of the limits of liability under the Warsaw Convention.[166]

In another case, after a passenger had boarded the plane, the flight attendant insisted that his carry-on bag be checked in with other baggage; the flight attendant gave the passenger a "'Limited Release' identification tag."[167] The tag, however, bore only an identification number and flight departure and destination information; it did not include a notice regarding the air carrier's liability limits under the Warsaw Convention.[168] That bag, mostly filled with jewelry and electronics, was lost but eventually found "heavily looted."[169] In a lengthy opinion, the court denied the airline's motion for summary judgment to limit its liability under the Warsaw Convention.[170] The court strictly construed Article 4, which also provided that an airline would be precluded from limiting liability "if the baggage check (unless combined with or incorporated in the passenger ticket) does not include the [Warsaw Convention] notice."[171] The court rejected the airline's argument that notice on the passenger ticket would suffice; it stated that the provision's plain language,

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the carrier . . . done with intent to cause damage or recklessly and with knowledge that damage would probably result." *Id.* art. 22, 25.

[163] *See* Schopenhauer v. Compagnie Nationale de Air France, 255 F. Supp. 2d 81, 86, 90 (E.D.N.Y. 2003).

[164] *Ijedinma*, 2001 WL 803745, at *1.

[165] *Id.* at *2. The court merely mentioned the amendment under Montreal Protocol No. 4 and its effective date of March 4, 1999, in a footnote, even though the baggage was lost on April 1, 1999. *Id.* n.1.

[166] *Id.* at *2.

[167] *Schopenhauer*, 255 F. Supp. 2d at 83.

[168] *Id.* at 83, 89.

[169] *Id.* at 83 n.4.

[170] *Id.* at 99.

[171] *Id.* at 92-93 (quoting Amended Warsaw Convention, *supra* note 120, art. 4(2)). The court relied on a line of cases that called for strict interpretation of the Warsaw Convention. *Id.* at 91-92; *see also supra* notes 153-58 and accompanying text.

the official French text of the Warsaw Convention, and common sense required the court to rule as it did because the baggage identification tag given to the passenger had not been combined with or incorporated in the ticket.[172]

As stated previously, as of November 4, 2003, the Montreal Convention now governs passenger baggage claims for international flights.[173] The Montreal Convention has relaxed the strict baggage documentation requirements under the original and amended versions of the Warsaw Convention.[174] Article 3 of the Montreal Convention merely requires that an air carrier provide a passenger with a "baggage identification tag for each piece of checked baggage," but does not provide that any particular information be provided on the tag.[175] An airline must still provide written notice of liability limitations, but the notice is no longer required on a baggage check claim stub.[176] Under article 2, an air carrier remains presumptively liable for loss of baggage and their contents, unless the damage was a result of a default or condition of the bag.[177] In addition, a passenger is now entitled to higher compensation for lost baggage.[178] An air carrier's limit is 1,000 Special Drawing Rights per passenger unless the passenger has declared and paid for higher value;[179] thus, liability for lost baggage is now a fixed amount rather than calculated based on weight.[180] The Montreal Convention did retain the provision whereby an air carrier may not further limit nor exculpate itself from liability; any purported attempt to do so in a contract of carriage will be void.[181] In addition, a passenger may still be compensated beyond the stated liability limits if the loss was caused by an act or omission of the air carrier that was intentional or reckless.[182] Given the foregoing, it seems as if there

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[172] *Id.* at 92-93. The court also indicated in dicta that the airline may make a favorable argument concerning combined passenger tickets and baggage checks. *Id.* at 93-98 (citing cases from Canada and the United Kingdom).

[173] Montreal Convention, *supra* note 122 and accompanying text.

[174] *See infra* note 175 and accompanying text.

[175] Montreal Convention, *supra* note 122, art. 3(3).

[176] *Id.* art. 3(4).

[177] *Id.* art. 17(2).

[178] *See id.* art. 22(2).

[179] *Id.* One thousand special drawing rights equals approximately USD $1,350. *Ratification of the 1999 Montreal Convention on Aviation Liability*, 98 AM. J. INT'L L. 177, 178 (2004).

[180] *See* Montreal Convention, *supra* note 122, art. 22(2). This amount will be reviewed for inflation every five years. *Id.* art. 24.

[181] *Id.* art. 26.

[182] *Id.* art. 22(5).

may be less litigation, not necessarily less incidents, involving lost baggage on international flights. Only time will tell.

IV. POST 9/11 CONCERNS REGARDING LOSS OF JEWELRY FROM CHECKED BAGGAGE

Soon after the September 11, 2001, hijackings and terrorist attacks, President George W. Bush signed into law the Aviation and Transportation Security Act ("ATSA").[183] Among other things, ATSA created the Transportation Security Administration ("TSA").[184] Under ATSA, the TSA is required to screen all carry-on and checked baggage at all U.S. airports.[185] In addition, where there are no TSA screeners, whether in U.S. or foreign airports, aircraft operators must ensure that baggage has been inspected before it is carried on the plane or loaded into the baggage hold.[186]

Unfortunately, a consequence of such heightened security screening procedures has been an increase in rampant incidents of theft of property from passenger luggage. Newspaper articles continue to report arrests of screeners who stole jewelry and other items from checked baggage.[187] "Ever since the government began screening checked luggage for explosives . . . , the airlines and the [TSA] have been arguing over who should be held responsible [for property] found missing from a bag."[188]

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183 Aviation and Transportation Security Act, Pub. L. 107-71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C.).

184 49 U.S.C. § 114 (Supp. I 2001).

185 *Id.* § 44901(c); *see also* 49 C.F.R. §§ 1544.207, 1546.207 (2004).

186 *See* 49 C.F.R. §§ 1544.207, 1546.207.

187 *See, e.g.*, Jaime Hernandez, *Feds Accuse Bag Screeners of Stealing Money; Officials Say 4 at Airport Took Credit Cards, Money*, S. FLA. SUN-SENTINEL, Jun. 30, 2004, at 1B, *available at* LEXIS, News Library, Sunsen File (four airport screeners arrested for stealing property, including actress Shirley MacLaine's jewelry, from passenger luggage); Michelle Hunter, *9 Screeners Booked in Thefts from Bags*, TIMES-PICAYUNE, Jun. 23, 2004, *available at* http://www.nola.com/news/t-p/index.ssf?/base/news-1/1087975577204420.xml (nine screeners arrested for pilfering luggage; passenger certain screeners responsible for loss of watch, bracelets and diamond necklace from checked baggage); Corey Kilgannon, *4 Baggage Screeners Arrested; TV Stars Were Among Victims*, N.Y. TIMES, Aug. 12, 2004, at B2, *available at* LEXIS, News Library, Curnws File (TSA agents arrested for stealing gold and silver watches and rings among other jewelry from passenger luggage).

188 Susan Stellin, *When Screeners Open Your Bags*, N.Y. TIMES, May 30, 2004, B5, at 2. Apparently airlines have agreed to pay about 60% of claims payments, with the TSA paying the balance. *Id.* Delta excludes liability for loss of baggage "that may result from a security search . . . by . . . any local, state, or federal agency in charge of airport security screening." Delta Domestic General Rules, *supra* note 75. Continental Airlines also excludes liability for any loss "arising out of security

Given the discussions in Parts II and III above, air carriers generally are liable for loss of baggage, although their liability generally is limited unless the passenger has paid for excess value insurance.[189] However, as also indicated, some courts have upheld exculpatory clauses wherein airlines exclude liability for jewelry.[190] Neither the law on liability for domestic baggage loss, the Warsaw Convention nor the Montreal Convention addresses the issue of airline liability where theft may occur during baggage screening. So, this begs the question of whether an airline should or would be responsible for loss of jewelry from checked luggage that is inspected.

The TSA's website and most air carriers' websites suggest that passengers carry valuables on their person or in their carry-on baggage.[191] This, presumably, would altogether eliminate the problem of thefts during screening of checked luggage. However, even if passengers follow the advice posted on these websites, their jewelry is still subject to being lost, or more likely, stolen. First, theft may occur during screening of carry-on luggage.[192] Second, even if jewelry is not pilfered during this pro-

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screening." Continental Airlines, Inc., Contract of Carriage, *supra* note 75. There are no reported cases as to whether these exclusions would be valid when TSA agents conduct these inspections. Courts have held that an airline or its agents may be liable for losses that occur during security checkpoints conducted by the air carrier's agent. *See, e.g.*, Wackenhut Corp. v. Lippert, 609 So. 2d 1304 (Fla. 1992); Baker v. Lansdell Protective Agency, Inc., 590 F. Supp. 165 (S.D.N.Y. 1984); Huang v. Int'l Total Servs., 172 F.3d 48 (6th Cir. 1999). Nonetheless, if it can be proven that any loss of jewelry from baggage occurred because of theft by screeners that are not an airline's agent and, thus, outside of an airline's control, such as TSA agents, then an airline should not be held liable.

189 *See generally supra* Parts II & III.

190 *See supra* notes 91-98 and accompanying text.

191 *See, e.g.*, TSA, Travelers & Consumers Travel Tips, *at* http://www.tsa.gov/public; Delta Air Lines Inc., Baggage FAQ, *at* http://www.delta.com/travel/plan/baggage_info/index.jsp; American Airlines, Inc., General Information, *at* http://www.aa.com/content/travelInformation/baggage/generalInfo.jhtml?anchorEvent=false. The TSA website further suggests that passengers avoid wearing jewelry but place it in their carry-on baggage as the jewelry may set off the metal detector alarm during passenger screening. TSA, Travelers & Consumers Air Travel (Prepare for Takeoff - Dress the Part), *at* http://www.tsa.gov/public/interapp/editorial/editorial_1050.xml.

192 *See, e.g.*, *Wackenhut Corp.*, 609 So. 2d at 1305-06 (valuable jewelry allegedly missing from handbag scanned at airport security checkpoint); *Baker*, 590 F. Supp. at 167 ($200,000 worth of jewelry allegedly removed from passenger's carry-on luggage while passing through airport security checkpoint); Hunter, *supra* note 187 ("a screener . . . [was] charged with stealing $700 from . . . passenger's carry-on purse."); *Airport Security Screener Charged with Stealing Cash from Bag*, USA TODAY, Jul. 11, 2003, *available at* http://www.usatoday.com/travel/news/

cess, a passenger may still lose the ability to protect such valuables by taking them on the plane, notwithstanding the TSA's and air carriers' advice to the contrary, as the TSA feasibly could prevent a passenger from carrying a particular piece of jewelry onboard the plane.[193]

The purpose of such heightened security screenings is to prevent hijackings and introduction of weapons onboard an aircraft.[194] The TSA publishes a list of items considered dangerous that will be prohibited as carry-on items on a plane.[195] The list includes such obvious items as meat cleavers, baseball bats, spear guns, and crowbars.[196] Most personal items can be taken on board, such as cuticle cutters, eyeglass repair kits, and tweezers.[197] The list does not mention any jewelry as being prohibited onboard as a carry-on item. However, the TSA also states that the list is not all inclusive and that, "[t]o ensure everyone's security the screener may determine that an item not on [the] chart is prohibited."[198]

The TSA does not provide written information regarding prohibitions on jewelry.[199] It is in the screener's discretion to determine whether any particular item of jewelry may be prohibited;[200] thus, a passenger may not be made aware of the perceived problem until the passenger reaches the security checkpoint.[201] What types of jewelry might fit this category? Generally, no sharp items are allowed through security and onto a plane.[202] Thus, items such as necklace clasps, brooches,[203] and

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2003/07/10-screener-theft.htm (money stolen by screener while inspecting passenger's property at airport security checkpoint).

193 *See infra* notes 198-206 and accompanying text.

194 *See* 49 U.S.C. §§ 40101, 44901; 49 C.F.R. §§ 1544.203, 1546.203; *see also Requirements for Airport Security Screeners, at* http://www.airsafe.com/issues/security/screener.htm.

195 TSA (list of prohibited items) *at* http://www.tsa.gov/interweb/assetlibrary/Permitted_Prohibited_7_14_2004.pdf [hereinafter TSA List].

196 *Id.*

197 *Id.*

198 *Id.*

199 Telephone interview by Alexis Gelb-Brown with Monica (last name withheld), TSA (Jun. 1, 2004).

200 *See* TSA List, *supra* note 195.

201 *See supra* note 193 and accompanying text.

202 *See supra* notes 195-196 and accompanying text.

203 *See* Douglas Hairston, *Travelers Flying for Holiday, Area Agents Say, at* http://www.martinsvillebulletin.com/Archive/2001/Dec%20'01/d121701.htm (travel agents state that anything that can be used as a weapon, such as "brooches with long pins," will not be allowed in carry-on baggage).

even earrings[204] could conceivably be considered sharp enough to be prohibited from being taken onto a plane. When asked on what basis a brooch would be considered dangerous, a TSA agent at a Miami International Airport security checkpoint separated his thumb and index finger to about three inches to indicate the minimum length of what he would determine to be an impermissible brooch pin.[205]

If an agent determines that the item of jewelry is potentially dangerous, then the passenger will have the option of possibly placing the item in checked baggage after consultation with the airline, taking the item to a car or locker, or abandoning the item altogether.[206] Most passengers probably would not abandon their jewelry; if left with the TSA, it will not be returned.[207] The option of placing the jewelry in a car or locker is only viable for those passengers flying round-trip as they can retrieve the articles upon their return. The third option, sending the jewelry in checked baggage, creates its own set of problems. First, once again the items are subject to being lost. A passenger will only be reimbursed for this loss up to the maximum set by law.[208] In addition, in most domestic flight cases, the air carriers have included exculpatory clauses in their contracts of carriage which, if upheld by the courts, will completely exonerate the airline from liability.[209] Second, as the security check may take place only minutes before boarding time, the baggage might not be loaded on time on that particular flight. Also, the passenger might not have an opportunity to buy excess value insurance. If this should happen, the airline's liability for any loss could hinge on whether it followed the precepts of the released valuation doctrine.[210] Since a passenger may still run the risk of losing jewelry meant to be carried on a plane, as it may not be permitted onboard, it would behoove a passenger to limit jewelry to only what can be worn, paying special attention to the size and sharpness of any particular piece and, of course, its value.

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[204] A friend related to me that her earrings were inspected when going through the airport in New York in April 2004.

[205] Interview with TSA screener (name withheld), TSA, Miami International Airport, in Miami, Fla. (Apr. 20, 2004).

[206] TSA List, *supra* note 195.

[207] *Id.*

[208] *See supra* notes 57, 179 and accompanying text.

[209] *See supra* notes 79-98 and accompanying text.

[210] *See supra* notes 14-15 and accompanying text.

V. CONCLUSION

More than 587 million passengers, each subjected to security screening (as was their baggage), flew on domestic flights in 2003.[211] Since the inception of the TSA, more than 29,000 claims have been filed for lost or damaged baggage.[212] What can be done to decrease claims and costs and yet compensate passengers for lost jewelry? The law could be changed to expressly permit exculpatory clauses for loss of valuables such as jewelry. However, this would permit airlines to altogether avoid liability for baggage under their care. The law could prohibit exculpatory clauses whether on international flights, as it does now,[213] and on domestic flights, where there is a split of authority on the issue.[214] This is a viable option given that an air carrier's liability for loss is already limited under law[215] and passenger compensation for any such loss is subject to proof of claim.[216] The law could be changed to increase the limits payable to a passenger for losses. However, these increased costs to the airlines would most likely be passed on to the passenger through increased costs of airfare.[217] An air carrier could ask a passenger at the time of ticket purchase whether the passenger wishes to purchase excess value insurance. But passengers may purchase tickets well in advance without knowing what items of jewelry they may be taking on the flight; thus, this may lead to an unnecessary expense for the passenger. In addition, one may question whether this may lead to fraudulent claims. However, air carriers limit the maximum amount of excess value insurance that may be purchased.[218] And, as previously noted, some air carriers exclude checked jewelry from excess value insurance

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[211] U.S. Bureau of Transp. Statistics, *Domestic Airline Traffic up 13.1 Percent in April 2004 from April 2003* (2004), *available at* http://www.bts.gov/press_releases/2004/bts019_04/html/bts019_04.html#table_01.

[212] Stellin, *supra* note 188.

[213] Montreal Convention, *supra* note 122, art. 26.

[214] *See supra* notes 76-98 and accompanying text.

[215] Montreal Convention, *supra* note 122, art. 22(2); 14 C.F.R. § 254.4.

[216] *See, e.g.*, Delta Domestic General Rules, *supra* note 75; Continental Airlines, Inc. Contract of Carriage, *supra* note 75.

[217] "The Department of Transportation . . . has determined that without baggage liability limitations, an airline's exposure for the loss of valuable items, such as jewelry, would add significantly to airlines' costs, thereby resulting in higher ticket fares." Wackenhut Corp. v. Lippert, 609 So. 2d 1304, 1307 (Fla. 1992) (citing *Complaint Against Limitation of Liability Tariffs of Braniff Airways, Inc., and Northwest Airlines, Inc.*, Docket 40373 (U.S. Dep't of Transp. Order Dismissing Complaint issued Dec. 2, 1987)).

[218] *See, e.g.*, Delta Domestic General Rules, *supra* note 75.

coverage.[219] However, just as the law should invalidate exculpatory provisions, these exclusions from excess insurance should be invalid as well.

At the least, an airline could provide the written notice of liability limits and availability of insurance at the time of ticket purchase and have passengers initial or check off that they have been notified of the availability of this insurance.[220] An air carrier could also notify a passenger about the availability of excess value insurance at the time of check-in at the airport. Under current law, written notice of availability of this insurance is sufficient;[221] the ticket agent does not need to verbally notify the passenger.[222] However, such verbal notification may slow down the check-in process, and create inefficiency at a time when check-in and boarding is already slow given existing security procedures.[223] Ultimately, to lessen costs of the loss of jewelry, passengers should leave home without it or risk losing their diamonds in the sky.

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[219] *See supra* note 78.

[220] *But see Deiro v. Am. Airlines, Inc.*, 816 F.2d 1360, 1366 (9th Cir. 1987) (citing Am. Ry. Express Co. v. Lindenberg, 260 U.S. 584, 590-91 (1923) (passenger's signature not required on notice of carrier's liability limitations)).

[221] *See supra* notes 72-73 and accompanying text.

[222] *See Deiro*, 816 F.2d at 1366 ("[f]ederal common law has never required actual notice of a carrier's liability limitation.").

[223] *See Simulation Modeling Plays Critical Role in Designing Security*, 10 WORLD AIRPORT WEEK, Jan. 23, 2003, *available at* 2003 WL 9793275.